Filed 5/31/16 In re D.W. CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re D.W., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.W., Defendant and Appellant.	A145470 (City & County of San Francisco Super. Ct. No. JW15-6002)

D.W. appeals from a dispositional order declaring him a ward of the court and placing him on probation in the home of his guardian after he was found to have violated Penal Code sections: 29615 (minor in possession of a concealable firearm); 25400, subdivisions (a)(2), (c)(6)(A), (c)(6)(B) (nonregistered owner carrying a concealed, loaded firearm); and 25850, subdivisions (a), (c)(6) (nonregistered owner carrying a loaded firearm in public). He contends that his motion to suppress evidence was wrongly denied and challenges conditions of his probation that prohibit possession of weapons. We affirm the ruling on the motion to suppress and the resulting jurisdictional findings. We modify the probation conditions, and affirm the dispositional order as so modified.

I. BACKGROUND

On the afternoon of January 12, 2015, San Francisco police officers Solares, Ochoa, and Johnson were on patrol in the area of Palou Avenue and Newhall Street in

response to a broadcast that someone in the area might have a firearm. They saw five to eight individuals, most of whom they knew to have gang associations, standing on the corner of Palou and Newhall, in a rival gang area. The officers were concerned that the group might be trying to attract violence and contacted them to find out what they were doing.

As Solares approached them, he smelled the odor of marijuana on D.W.'s clothes and breath. Solares said, "Man, you smell like marijuana," and D.W. admitted he had just smoked some. The officers decided to search D.W. for more marijuana. Ochoa told D.W. to put his hands on his head, and D.W. "tried to pull away like . . . he didn't want me to search him." Ochoa put his hand underneath D.W.'s backpack, and felt a revolver. The officers handcuffed D.W. and retrieved the revolver from the backpack. After conducting the search, the officers determined that D.W. was 17 years old.

D.W. moved to suppress the evidence obtained in the search. He argued: "In the case at bar, none of the officers on the scene observed any suspected drug contraband in plain view of the minor. . . . Smelling of marijuana is not a crime; being under the influence of marijuana is not a crime. There was no probable cause to search him. There was no probable cause to arrest the minor for anything (and thereby, search him incident to a valid arrest), and there was no reasonable suspicion that he was armed and dangerous."

The court denied the motion to suppress, ruling: "The way the Minor's argument is sort of framed is even if [D.W.] smelled and made the admission, they didn't have probable cause to arrest [him]. I think there's a big distinction [between probable cause] to arrest and [probable cause] to search. . . . [¶] . . . [¶] While the cases mostly talk about cars and vehicles and houses and luggage, the central theme that rises and can be seen through all the cases is that a strong smell can establish probable cause to believe contraband is present and the search is allowable and legal. [¶] . . . [¶] The court does find based upon the totality of the circumstances that the officers did have probable cause and that probable cause was reasonable based upon the facts and circumstance in this particular case and that they found the gun during a lawful search for contraband."

I. DISCUSSION

A. Motion to Suppress

"The standard of review of a trial court's ruling on a motion to suppress is well established and is equally applicable to juvenile court proceedings. ' "On appeal from the denial of a suppression motion, the court reviews the evidence in a light favorable to the trial court's ruling. [Citation.] We must uphold those express or implied findings of fact by the trial court that are supported by substantial evidence and independently determine whether the facts support the court's legal conclusions." ' " (*In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1236.)

The court concluded here that the facts established probable cause to search D.W. for marijuana. "[P]robable cause for a search exists where an officer is aware of facts that would lead a man of ordinary caution or prudence to believe, and conscientiously to entertain a strong suspicion that the object of the search is in the particular place to be searched." (*Wimberly v. Superior Court* (1976) 16 Cal.3d 557, 564.) We agree this standard was satisfied. D.W. not only smelled of marijuana, he admitted that he had recently smoked some. " 'It requires no perspicacious intellect to reason the person smoking one marijuana cigarette may well want another and will carry sufficient marijuana to satisfy his appetite of the moment. This fundamental observation, previously made by another court faced with this similar issue, is only common sense.' " (*People v. Coleman* (1991) 229 Cal.App.3d 321, 327, disapproved on another ground in *People v. Williams* (1999) 20 Cal.4th 119, 133; see *People v. Fitzpatrick* (1970) 3 Cal.App.3d 824, 827 [it is "reasonable to believe that one who has recently smoked a marijuana cigarette has others in his possession"] .)

D.W. contends that to be lawful the search must have been justified by an exception to the warrant requirement, such as the "automobile" exception which permits warrantless searches of vehicles when the police have probable cause to believe that it contains contraband or evidence. (*People v. Superior Court* (2007) 151 Cal.App.4th 85, 100.) He argues that because no previously recognized exception applies, the search of his backpack was per se unreasonable in violation of the Fourth Amendment.

But we conclude the search was permissible as incident to an arrest. Probable cause to arrest exists " 'when the facts known to the arresting officer would persuade someone of "reasonable caution" that the person to be arrested has committed a crime.' " (*People v. Thompson* (2006) 38 Cal.4th 811, 818.) While the trial court was correct to observe that the standards for probable cause to search and probable cause to arrest are not the same, here they are equivalent. The probable cause to believe that D.W. had marijuana on his person provided probable cause for the officer to believe that he was committing the criminal infraction of possessing less than 28.5 grams of marijuana. (Health & Saf. Code, § 11357, subd. (b).)

It is immaterial that the search preceded D.W.'s arrest. "If [the officer] had probable cause to believe [the suspect] possessed illegal drugs, the search and seizure are justifiable as incident to a lawful arrest. It matters not that they occurred before a formal arrest. '[I]f the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested . . . there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest.' " (*People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1189, quoting *People v. Simon* (1955) 45 Cal.2d 645, 648; see *Rawlings v. Kentucky* (1980) 448 U.S. 98, 111 [when there is probable cause to arrest and the arrest follows quickly after a challenged search, it is not important that the search preceded the arrest rather than vice versa].)

It is also immaterial whether under California law D.W. was subject to a custodial arrest for the suspected infraction. This point was established in *People v. McKay* (2002) 27 Cal.4th 601 (*McKay*). The defendant in *McKay* was arrested for riding a bicycle the wrong way on a residential street, and methamphetamine was found in his sock during a search incident to his arrest. The defendant moved to suppress, arguing that the search was not conducted incident to a lawful arrest because the officer did not comply with a Vehicle Code provision governing the arrest procedure for the infraction. The court concluded that "custodial arrests for fine-only offenses do not violate the Fourth Amendment and that compliance with state arrest procedures is not a component of the

federal constitutional inquiry." (*Id.* at p. 605.) This conclusion was based on *Atwater v. City of Lago Vista* (2001) 532 U.S. 318 (*Atwater*), which upheld a custodial arrest for the offense of violating Texas's seatbelt law punishable only by fine. "Under *Atwater*, all that is needed to justify a custodial arrest is a showing of probable cause. 'If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." (*McKay, supra*, 27 Cal.4th at p. 607, quoting *Atwater, supra*, 532 U.S. at p. 354.) Since the police had probable cause to believe that D.W. committed the marijuana infraction, he could be arrested for the infraction and searched incident to that arrest consistent with the Fourth Amendment.

D.W. cites *People v. Hua* (2008) 158 Cal.App.4th 1027, 1035 (*Hua*), and *People v. Torres* (2012) 205 Cal.App.4th 989 (*Torres*) to support a different conclusion, but both those cases are distinguishable because they involved searches of a dwelling rather than a person.

Entry of the home is the chief evil against which the Fourth Amendment is directed, and warrantless searches and seizures inside one's home are presumptively unreasonable. (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 748–749 (*Welsh*).) Thus, "[a]n exigent circumstance is needed for a warrantless entry into one's home regardless of the strength of probable cause to arrest . . . ." (*People v. Ortiz* (1995) 32 Cal.App.4th 286, 291.) "*Welsh* reasoned that 'an important factor to be considered when determining whether any exigency exists [to justify a warrantless entry] is the *gravity of the underlying offense* for which the arrest is being made.' [Citation.] Welsh was arrested for his first driving under the influence (DUI) offense, and, in Wisconsin, such offenses were classified as noncriminal, civil forfeiture offenses for which no imprisonment could be imposed. On that basis, the Supreme Court determined the warrantless entry was unreasonable. [Citation.]" (*Hua, supra,* 158 Cal.App.4th at p. 1035 [italics added]). *Welch* was applied in *Hua* and *Torres* to preclude warrantless searches of the defendants' dwellings where there was no probable cause to believe that the defendants possessed more than 28.5 grams of marijuana, and thus no "reason to fear the imminent destruction

of evidence of a *jailable* offense." (*People v. Torres, supra*, 205 Cal.App.4th at p. 995 [italics added], following *Hua*.) Because they involved entry into a dwelling, *Hua* and *Torres* are inapposite, and the heightened Fourth Amendment protection against such entries has no bearing in this case. Instead, D.W.'s case is controlled by the holdings in *Atwater* and *McKay* that probable cause to believe the suspect has committed a jailable offense is not required for searches of the person.

Accordingly, the motion to suppress was properly denied.

B. Probation Conditions

Written conditions of D.W.'s probation prohibited him from possessing "weapons of any kind, which means no guns, knives, clubs, brass knuckles, attack dogs, ammunition, or something that looks like a weapon. You are not to possess anything that you could use as a weapon or someone else might consider to be a weapon."

At the dispositional hearing, the court expanded on the weapons conditions as follows: "You are not to possess weapons of any kind which means that you are not to possess any firearms, ammunition, knives, clubs, brass knuckles. You're not to possess *anything that looks like a weapon*. You're not to possess *anything that can be used by you as a weapon*. You're not to possess *anything that can be considered by someone else to be a weapon*. You're not to possess anything that you intend to use as a weapon. That includes toy, replica, look alike guns and weapons." (Italics added.)

D.W. contends that the italicized portions of the conditions read by the court are unconstitutionally vague. "Under Welfare and Institutions Code section 730, subdivision (b), a juvenile court may impose 'any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' In spite of the juvenile court's broad discretion, '[a] probation condition "must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated," if it is to withstand a challenge on the ground of vagueness.' " (*In re Kevin F.* (2015) 239 Cal.App.4th 351, 357 (*Kevin F.*) D.W. asks "what, exactly, 'looks like a weapon?' " and

wonders how he can be expected "to determine what 'can be considered by *someone else* to be a weapon.' "

D.W. further argues that the conditions are both overbroad and incomplete because they could be read to prohibit possession of items as innocent as a pencil that might possibly be used as a weapon, and they do not include a knowledge requirement that would preclude him from innocently violating them. These arguments are supported by the decision in *Kevin F.*, *supra*, 239 Cal.App.4th 351, which involved similar weapons possession prohibitions. The court faulted the probation conditions in that case because they were "broad enough to include any object that *could* injure someone, even an ordinary household object, regardless of Minor's intent in possessing it" (*id.* at p. 360), and they did not include "a requirement of actual knowledge of the character of the weapon . . . to avoid criminalizing innocent conduct" (*id.* at p. 365). The court therefore modified the conditions with the words we have placed in italics: "The minor shall: . . . Not *knowingly* possess weapons of any kind, which means no guns, knives, brass knuckles, attack dogs, ammunition, or something that looks like a weapon. In addition, you are not to *knowingly* possess anything that you *intend to* use as a weapon or that *you know* someone else might consider to be a weapon." (*Id.* at p. 366.)

Our Supreme Court has granted review to decide whether an explicit knowledge requirement is mandated in a probation condition that prohibits possession of weapons and to address whether the condition at issue in the case is unconstitutionally vague. (*People v. Hall*, review granted June 19, 2015, S227193.) Since probation may not be revoked unless the probationer's conduct constitutes a willful violation of the terms of probation (*People v. Galvan* (2007) 155 Cal.App.4th 978, 983), it may not be necessary to include an express knowledge requirement to protect against enforcement of unwitting violations. However, we see no harm in adding such a requirement pending our Supreme Court's resolution of the issue. We will assume without deciding that the conditions prohibiting possession of anything that looks like a weapon or that someone might consider to be a weapon are impermissibly vague, and add a requirement that the perception be reasonable in order to clarify those conditions. To eliminate any risk that

probation could be revoked for possession of something that is not designed to be or look like a weapon and that D.W. does not intend to employ as a weapon, we will delete the condition prohibiting possession of anything that can be used as a weapon.

III. DISPOSITION

The jurisdictional findings are affirmed. The conditions of probation prohibiting possession of weapons are modified to read: "You are not to knowingly possess weapons of any kind which means that you are not to possess any firearms, ammunition, knives, clubs, brass knuckles. You are not to knowingly possess anything that could be reasonably perceived to be a weapon. That includes toy, replica, and look-alike guns and weapons. You are not to possess anything that you intend to use as a weapon." As so modified, the dispositional order is affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.

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